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“IDEOLOGY IN” OR “CULTURAL COGNITION OF” JUDGING: WHAT DIFFERENCE DOES IT MAKE?

DAN M. KAHAN*

I.

I will offer a critique of the increasingly popular claim that judging is “ideological” in nature. That claim rests on a growing body of empirical literature that correlates federal judges’ decisions with some measure of their ideology, typically the political party of the president who appointed them.¹ I’m going to argue that proponents of this position, which I’ll call the “ideology thesis,”² haven’t adequately specified the mechanism by which they understand values to be influencing judges. These proponents have failed, in particular, to distinguish between values as a *self-conscious motive* for decisionmaking and values as a *sub-conscious influence on cognition*.³ Once that distinction is made, it becomes clear that the evidence cited to support the ideology thesis fits just as well with another account, which I’ll call the “cultural cognition

* Elizabeth K. Dollard Professor of Law, Yale Law School. Professor Kahan delivered the Twelfth Annual Robert F. Boden Lecture at Marquette University Law School in October 2008.

1. See generally Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831 (2008) (giving an overview of the ideology thesis).

2. See *id.* For a critical reaction, see generally Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, DUKE L.J. (forthcoming 2009). Edwards and Livermore raise serious methodological issues relating to how proponents of the ideology thesis select and code data. *Id.* My critique raises questions about what exactly that data show, even assuming their collection and analysis are methodologically sound.

3. See *infra* text accompanying notes 5–20.

thesis.”⁴ Of course, I’ll also explain what the difference between ideology and cultural cognition is, and why it makes a difference, practically, whether it’s ideology or cultural cognition that’s affecting judges.

II.

But I’m going to start with a case, *Crawford v. Marion County Election Board*,⁵ which I will use to illustrate my claims and make them concrete. At issue in *Crawford* was the constitutionality of Indiana’s “Voter ID Law,” which prohibits a registered voter from casting a ballot unless he or she produces a driver’s license or other state-issued ID at the polling place.⁶ The United States Supreme Court upheld the law by a vote of 6-3⁷ in a decision that failed to generate a majority, or even a plurality, opinion.⁸ How to make sense of the competing rationales offered by the Justices who voted to uphold the law will no doubt be a matter of keen interest for election law scholars, not to mention lower court judges, who will now find themselves scratching their heads as they try to assess what standard to apply to Fourteenth Amendment Due Process challenges to state election laws. But for my purposes, it is more edifying to consider how the case played out in the court of appeals. The members of the three-judge panel that considered the case at that level agreed that the governing standard required them to determine whether the contribution Indiana’s Voter ID Law made to the State’s asserted interest in preventing voter fraud outweighed the alleged burden of the law on the right to vote.⁹ The panel split 2-1, however, on how that test should be applied.¹⁰

4. See *infra* text accompanying notes 21–25.

5. 128 S. Ct. 1610 (2008).

6. *Id.* at 1613.

7. *Id.* at 1613, 1624, 1627.

8. See *id.* at 1613 (Stevens, J., joined by Roberts, C.J., & Kennedy, J., announcing the judgment of the Court).

9. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 956–57 (7th Cir. 2007).

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.”

Id. (Evans, J., dissenting) (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)).

10. See *id.* at 951–52, 956–57. I am indebted to Linda Greenhouse for pointing out the relevance of the theory of cultural cognition to the issues posed by *Crawford*. *Crawford* is

At least as it was decided by the Seventh Circuit, *Crawford* satisfies the ideology thesis. The case has a clear partisan, political significance: Indiana's Voter ID Law was enacted by the Republican-controlled state legislature and challenged in court by the Democratic Party, which argued that the law was intended to discourage voting by low-income citizens, who tend to support Democratic candidates.¹¹ In the court of appeals, Judge Posner, who wrote the majority opinion, and Judge Sykes, who joined it, were appointed by Republicans, and Judge Evans, the dissenter, was appointed by a Democrat.¹² Accordingly, the case fits the criteria that ideology thesis proponents use to identify cases that support their claim.¹³

But as I suggested, I think the proponents of the ideology thesis have not been sufficiently clear about what they mean when they say that a decision is "ideological." This ambiguity relates to three distinct ways in which values might be influencing a decision like that in *Crawford*.

First, values could supply a self-conscious *partisan motivation* for a decision. That is, judges could be choosing the outcome that best promotes their political preferences without regard for the law. This is the most straightforward interpretation of the claim that a decision is "ideological" and is what I think most proponents of the ideology thesis have in mind when asserting this claim and what most people understand them to be saying.

Second, values could supply a self-conscious *legal motivation* for a decision. On one popular account of judicial decisionmaking, particularly in constitutional law, there is not a strict separation between moral reasoning and legal reasoning.¹⁴ Judges must resort to normative theories to connect abstract concepts like "free speech" and "equal protection" to particular cases.¹⁵ So in *Crawford*, for example, judges would resort to values—economic efficiency, individual liberty, and the like—to determine how to balance the state interest in avoiding fraud and the right of individuals to vote, including what weights to assign each of them.

one of several decisions that Greenhouse insightfully analyzed in her Brandeis Lecture, The Counter-Factual Court, at the Louis D. Brandeis School of Law, University of Louisville (Mar. 5, 2008).

11. See Linda Greenhouse, *Justices Agree to Hear Case Challenging Voter ID Laws*, N.Y. TIMES, Sept. 26, 2007, at A24.

12. *Id.*

13. See Miles & Sunstein, *supra* note 1, at 839–40.

14. See, e.g., RONALD DWORKIN, *LAW'S EMPIRE*, at ix (1986).

15. See *id.* at 357.

It wouldn't do violence to language to describe this function of values as "ideological." But it would let a lot of the steam out of the "ideology thesis" to do so. The normally understood significance of the thesis—its shock value, as it were—is that judges' professed fidelity to law is a conceit because "ideology" is trumping "law" in their decisions. That's the clear import of the "partisan motivation" conception of the ideology thesis. But if ideological decisionmaking includes the self-conscious use of values to determine the meaning of the law, the opposition between legal reasoning and ideological reasoning disappears: at that point, the use judges are making of "ideology" involves merely the sort of moral theorizing the law itself contemplates.¹⁶ In addition, while the moral theories judges draw on to give content to free speech, equal protection, etc., will correlate with their political party affiliations, anyone who is familiar with, or does research on, a judge's past decisions will likely be able to discern the theory the judge favors. Using the theory, she'll often be able to predict that judge's decisions better than if she merely considers the party of the president who appointed that judge. (Think, for example, of the theories of free speech, equal protection, and criminal procedure worked out by Justices Warren, Brennan, and Blackmun, all of whom were appointed by Republicans.)

I don't think, though, that values as legal motivation explain what's going on in a case like *Crawford*. We might believe, from reading their opinions and their other writings, that Judge Posner is inclined to read "efficiency" into the Constitution and that Judge Evans, the dissenting judge, would object to making enforcement of First and Fourteenth Amendment rights conditional on cost-benefit analysis. But that actually wasn't the sort of debate that those judges were engaged in.¹⁷ They disagreed not about what moral theory should inform constitutional review of the Indiana Voter ID Law, but about how to resolve certain disputed *factual* claims embedded in what they agreed was the controlling standard.¹⁸

16. Brian Z. Tamanaha makes a similar argument in *The Realism of Judges Past and Present*, 56 CLEV. ST. L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1024747>. Tamanaha notes that judges have historically recognized, and recognized as consistent with principled decisionmaking, their reliance on their values where the law is indeterminate. *Id.* (manuscript at 10–18). Accordingly, Tamanaha concludes, it is neither surprising nor unsettling to discover that some (he argues small) percentage of cases correlate with judges' ideologies. *Id.* (manuscript at 18). While seconding much of Tamanaha's very persuasive case, I would characterize the tradition he relies on as embracing a more thoroughgoing repudiation of the positivist separation of law and morality.

17. See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 953, 955 (7th Cir. 2007).

18. See *id.*

Does the Voter ID Law advance a state interest in avoiding fraud? No, said Judge Evans, because there is no evidence of anyone ever impersonating a voter in an Indiana election. Yes, said Judge Posner, concluding that the absence of reported cases of impersonation suggests the prohibitive cost of detecting impersonators and the relative efficiency of using identification as a prophylactic safeguard.¹⁹

Does requiring identification *burden* prospective voters? Yes, said Judge Evans, noting the cost of obtaining identification for prospective voters of limited means, particularly ones who don't drive. No, said Judge Posner, noting that no individual *voter* had joined the Democratic Party as a plaintiff in the case.²⁰

The essentially factual nature of the disagreement between the majority and dissent suggests a third way in which values might be affecting their decisions: as a subconscious influence on cognition. Here the claim would be that Posner and Evans, contrary to the ideology-as-partisanship view, were sincerely basing their decisions on their views of the law. But what they understood the law to require was nevertheless shaped by their values—operating not as resources for theorizing law, but as subconscious, extralegal influences on their perception of legally consequential facts.

III.

This is an account that is suggested by the theory of cultural cognition, so let me now turn to that. The phenomenon of cultural cognition refers to the tendency of individuals to conform their views about risks and benefits of putatively dangerous activities to their cultural evalua-

19. Compare *id.* at 955 (Evans, J., dissenting) ("The fig leaf of respectability providing the motive behind this law is that it is necessary to prevent voter fraud—a person showing up at the polls pretending to be someone else. But where is the evidence of that kind of voter fraud in this record?") with *id.* at 953 (Posner, J.) ("[T]he absence of prosecutions is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator. . . . Another [response] . . . is to take preventive action, as Indiana has done by requiring a photo ID.").

20. Compare *id.* at 955 (Evans, J., dissenting) ("The real problem is that this law will make it significantly more difficult for some eligible voters . . . to vote. And this group is mostly comprised of people who are poor, elderly, minorities, disabled, or some combination thereof.") with *id.* at 951–52 (Posner, J.) ("There is not a single plaintiff who intends not to vote because of the new law—that is, who would vote were it not for the law. There are plaintiffs who have photo IDs and so are not affected by the law at all and plaintiffs who have no photo IDs but have not said they would vote if they did and so who also are, as far as we can tell, unaffected by the law. There thus are no plaintiffs whom the law will deter from voting.").

tions of those activities.²¹ Psychologically speaking, it's much easier to believe that behavior one finds noble is also socially beneficial and behavior one finds base is dangerous rather than vice versa.²² Persons who have relatively individualistic values, for example, tend to be skeptical about environmental risks, because they perceive (subconsciously) that concerns about such risks could lead to restrictions on commerce and industry, activities that people with individualistic values like.²³ People with egalitarian values, in contrast, see commerce and industry as sources of unjust disparities in wealth and thus readily embrace the claim that these activities are environmentally harmful and should be regulated.²⁴ Research done by the Cultural Cognition Project, a team of researchers of which I am a member, has revealed that these dynamics generate political conflict on a host of risk issues, from global warming to domestic terrorism, from school shootings to mandatory vaccination of school girls against HPV.²⁵

Research that I've done with another member of the team, Donald Braman, an anthropologist, shows that cultural cognition also creates conflict over legally consequential facts. In one study, for example, we found that people of egalitarian and hierarchical dispositions tend to form opposing beliefs about ambiguous facts in controversial self-defense cases.²⁶ Egalitarians tended to believe, and hierarchs to disbelieve, that a battered woman who killed her abusive husband in his sleep faced a genuine threat, honestly believed she was in danger, had no realistic opportunity to escape, and suffered from a psychological impairment of perception; however, in a case involving a beleaguered commuter who killed a panhandling African-American teen, it was hierarchs

21. See generally Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) (book review) (describing cultural cognition).

22. See generally *id.*; Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey Cohen, *Cultural Cognition of the Risks and Benefits of Nanotechnology*, 4 NATURE NANOTECHNOLOGY 87 (2009).

23. See Dan M. Kahan, Donald Braman, Paul Slovic, John Gastil & Geoffrey L. Cohen, *The Second National Risk and Culture Study: Making Sense of—and Making Progress In—The American Culture War of Fact 2–3* (Geo. Wash. Univ. Legal Studies, Research Paper No. 370; Yale Law Sch., Public Law Working Paper No. 154; Geo. Wash. Univ. Law Sch. Public Law, Research Paper No. 370; Harv. Law Sch. Program on Risk Regulation, Research Paper No. 08-26, 2007), available at http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1017189.

24. See *id.*

25. See generally *id.* (presenting how these issues are shaped by individual cultural views).

26. See Dan M. Kahan & Donald Braman, *The Self-Defensive Cognition of Self-Defense*, 45 AM. CRIM. L. REV. 1, 44–45 (2008).

who believed, and egalitarians who disbelieved, the parallel set of pro-defense factual claims.²⁷

In a second study, Braman and I, along with David Hoffman, found that cultural cognition influenced perceptions among subjects who watched a videotape of a high-speed car chase, shot from inside a police cruiser.²⁸ The U.S. Supreme Court had held that "no reasonable jury" could watch the tape and fail to conclude the driver posed a risk sufficiently lethal to justify deadly force to stop him (namely, the ramming of his car).²⁹ But we found that hierarchical and individualistic white males were significantly more likely to arrive at that conclusion than were egalitarians and communitarians of any race or gender.³⁰

IV.

Cultural cognition, I want to propose, might also have explained the disagreement among the judges who decided *Crawford* in the Seventh Circuit. The factual issues that divided those judges admitted of considerable uncertainty and turned on inconclusive evidence.³¹ Does the absence of reported instances of voter impersonation mean that this form of fraud doesn't occur, or only that detection of it *ex post* is indeed infeasible?³² Does the absence of any individual voter plaintiff in the case mean that the law doesn't significantly burden voters, or only that the burden of bringing a *lawsuit* exceeds the benefit to any individual of being able to cast a single vote, and that therefore the only entity likely to sue is a collective one like the Democratic Party?³³ On speculative questions like these, shouldn't we expect judges, like everyone else, to gravitate toward the factual beliefs that are most congenial to their defining commitments?

At this point, I suspect that some of you are probably saying, "get real: we know Posner's empirical just-so stories were disingenuous rationalizations of his and Sykes's selection of an outcome that benefited Republicans."³⁴ That is, many of you, I'm guessing, find it instinctively

27. *See id.* at 34.

28. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 879–80 (2009).

29. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007).

30. Kahan, Hoffman & Braman, *supra* note 28, at 879.

31. *See supra* notes 19–20.

32. *See supra* note 19.

33. *See supra* note 20.

34. *See supra* notes 19–20.

easier to believe that Posner's and Sykes's values supplied a self-conscious *partisan motivation* for their decision, as the proponents of the ideology thesis would likely say, rather than a subconscious influence on their cognition. Indeed, that's pretty much what Judge Evans asserted in his dissent.³⁵

Maybe. But note that a dismissive reaction of that sort is exactly what cultural cognition would predict on the part of those culturally predisposed to accept Judge Evans's view of the facts. One of the psychological mechanisms that accounts for cultural cognition is *naïve realism*, which refers to a psychological tendency to attribute the perceptions of those who disagree with us to the distorting impact of their political predispositions (the realism part) without being sensitive to how our own predispositions might affect our own perceptions (the naïve part).³⁶ It was this mechanism, Braman, Hoffman, and I concluded, that induced a majority of the Supreme Court to dismiss the possibility that anyone could "reasonably" interpret the video at issue in *Scott v. Harris* differently from how the Court did.³⁷

I'm not saying, of course, that *if* you instinctively doubt that cultural cognition was at work in *Crawford* your skepticism proves that it was. But I am saying that if you want to check any cognitive bias on your own part, you should be open to evidence that *neither* side in *Crawford* was dissembling and that instead *both* sides were subconsciously adopting factual beliefs congenial to their values.

I'll suggest two pieces of evidence, both of which are admittedly indirect. The first piece comes from Braman's and my self-defense study.³⁸ There, we actually used structural equation models to test competing hypotheses: (1) that subjects were basing their decisions explicitly on their values regardless of how they saw the facts, and (2) that they were instead basing their decisions on honest perception of the facts as shaped by their cultural predispositions.³⁹ We found the latter fit the

35. See *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (Evans, J., dissenting) ("Let's not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.").

36. See Robert J. Robinson, Dacher Keltner, Andrew Ward & Lee Ross, *Actual Versus Assumed Differences in Construal: "Naïve Realism" in Intergroup Perception and Conflict*, 68 J. PERSONALITY & SOC. PSYCHOL. 404, 405 (1995).

37. See Kahan, Hoffman & Braman, *supra* note 28, at 879.

38. See generally Kahan & Braman, *supra* note 26.

39. See *id.* at 29–30.

data much better.⁴⁰ If that's what happens when ordinary people have to make sense of ambiguous facts, it's plausible that it's what happens with judges when they have to do so in cases like *Crawford*.

My second piece of evidence comes from another law review article. In it, the author explicitly finds that, at least, where it is difficult "to verify (or falsify) empirical claims by objective data," judges, like people generally, "perforce fall back on their emotions or intuitions. They practice . . . 'cultural cognition.'"⁴¹ I didn't write that. Judge Posner did, in an article published just a few months before he wrote *Crawford*.⁴²

This statement is an admission of fallibility, not a boast. I'm not sure what Posner would say if we suggested it as an explanation for his factual conclusions in *Crawford*. But because I don't think he's inclined to be a liar, I find his candid admission of susceptibility to this form of bias in general grounds for attributing his beliefs (and Evans's, too) to cultural cognition in that case.

V.

Does it make any difference whether decisions like *Crawford* reflect values as a self-conscious *partisan* influence on decisionmaking—the conventional understanding of the ideology thesis—or as a subconscious *cognitive* one in the way the cultural cognition theory contemplates? I should think it's pretty obvious that it does. Not only would the cultural cognition thesis, if true, spare us from the disappointment associated with believing that judicial disagreement stems from self-conscious, and self-consciously concealed, political disregard for law, but also it would supply us with tools for mitigating this form of judicial conflict. Research has revealed a variety of techniques for counteracting cultural cognition.⁴³ Many of these techniques could likely be employed by judges, who, as Judge Posner has admitted, recognize that they, like everyone else, are prone to adopt factual beliefs congenial to their values.⁴⁴

40. See *id.* at 44–45.

41. Richard A. Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U. L. REV. 1049, 1065 (2006) (quoting Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150 (2006)).

42. *Id.*

43. See generally Geoffrey L. Cohen, David K. Sherman, Anthony Bastardi, Lee Ross, Lillian Hsu & Michelle McGoey, *Bridging the Partisan Divide: Self-Affirmation Reduces Ideological Closed-Mindedness and Inflexibility in Negotiation*, 93 J. PERSONALITY & SOC. PSYCHOL. 415 (2007); Geoffrey L. Cohen, Joshua Aronson & Claude M. Steele, *When Beliefs Yield to Evidence: Reducing Biased Evaluation by Affirming the Self*, 26 PERSONALITY & SOC. PSYCHOL. BULL. 1151 (2000).

44. See generally Kahan, Hoffman & Braman, *supra* note 28. Jeffrey J. Rachlinski, Chris

Does it make any difference, though, whether we call the cultural influence of values on judicial decisionmaking “cultural cognition” or “ideology”? Why not see cultural cognition as simply a psychological account of how *ideology* actually works—by influencing individuals, including judges, to form factual perceptions that match a contestable vision of the good society?

The answer I’d give has to do with the *functional* connection between cultural cognition and the values that inform it. I don’t believe there is one. Most accounts in sociology and many in contemporary social psychology treat “ideology” as a force that reinforces a particular social structure or promotes the interest of some privileged group.⁴⁵ Nothing in cultural cognition, as I’ve described it, depends on or entails any functional relationship like that, and I personally find this sort of claim implausible.

If, however, you also find the functionalist claim implausible, or just unimportant, and still prefer to think of cultural cognition as “ideology,” that’s fine with me. All that matters is that you recognize that there *is* a difference, conceptually, between the subconscious cognitive influence of values and the conscious, partisan motivating influence of values, and that it makes a difference, practically, which, if either, explains judicial disagreement. So long as our vocabulary brings these distinctions into view—something the dominant ideology thesis doesn’t—I don’t think what we call the cognitive influence of values on judging makes any difference at all.

Guthrie, Andrew J. Wistrich, Sheri Johnson, and their collaborators have identified various biases that judicial habits of mind appear to counteract. See generally Jeffrey J. Rachlinski, Andrew J. Wistrich, Sheri Johnson & Chris Guthrie, *Does Unconscious Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. (forthcoming 2009), available at <https://www.law.uchicago.edu/files/lawpoliticswkshp-rachlinski.pdf>; Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1 (2007).

45. See JON ELSTER, MAKING SENSE OF MARX 459–65 (G.A. Cohen, Jon Elster & John Roemer eds., 1985).